

1930

# The World Court

Frank B. Kellogg

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

---

## Recommended Citation

Kellogg, Frank B., "The World Court" (1930). *Minnesota Law Review*. 1307.  
<https://scholarship.law.umn.edu/mlr/1307>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact [lenzx009@umn.edu](mailto:lenzx009@umn.edu).

# MINNESOTA LAW REVIEW

*Journal of the State Bar Association*

---

VOLUME XIV

JUNE, 1930

No. 7

---

## THE WORLD COURT†

By FRANK B. KELLOGG\*

THERE is undoubtedly a greater movement for peace in the world today than ever before. It is not difficult to see what has given such a tremendous impetus to this tidal wave of public opinion. It is but ten years since the close of the most appalling war of all times; a war which sacrificed nine million men upon its altar, devastated fair lands, and cast its shadow over millions of homes. But ten years have elapsed, and they have not effaced from the memory of men and women that awful catastrophe.

It was in this atmosphere that the pact of Paris was born. It was inspired by the longing of men and women for peace, by the memory of devastated battle fields, ruined homes, broken men and women, memories which stirred the great heart of humanity.

Is it any wonder that the people of all nations are asking the question: Is there not some way of settling international disputes, other than the terrible arbitrament of arms?

Authors of the peace pact, and the statesmen who signed it, believed that what was needed was a treaty which would pledge the honor of all nations not to go to war for the adjustment of their difficulties. For ages, war had been the instrument of nations, legalized by international law. What was needed was a treaty which should reverse the principle of international law and make war a crime against international law.

I have often been asked what I would recommend to implement the treaty; to make it more effective. I believe it is very

---

\*Of the St. Paul, Minnesota, bar; former Secretary of State of the United States.

†An address delivered on April 30, 1930 at the annual dinner of the University of Minnesota Law School.

effective now, and that it has shown its effectiveness in the last year. My answer has always been that the treaty will be kept effective when it is supported by the public opinion of the world. For when the people determine that there shall not be war, there will not be war!

I believe that when nations become accustomed to settling their difficulties by diplomatic, pacific means, by arbitration and judicial settlement of legal questions, it will be a great step forward in the maintenance of peace. I know of no work which lawyers can do that would be more effective, more beneficial to the world, than the advocating of judicial settlement of disputes; and there is no work in which you can engage with greater benefit and honor than to promote the adoption of the statutes of the World Court.

What is the World Court? Why, it is a tribunal of judges, the same kind of a tribunal that we have under our domestic law. Fifteen eminent lawyers of the world sitting as a court to decide international questions which the United States and other nations may voluntarily submit to it, if they see fit.

By joining the World Court, the United States does not obligate itself—nor does any other country, unless it signs the so-called “Optional obligatory clause”—to submit anything to the World Court. Can there be any great harm in the United States joining this court, when its only obligation is to pay about \$38,000 a year, as its share of the expenses of the court?

I know there is a popular idea that this court may give an opinion on any subject which it sees fit to do, which might affect the United States, and that by joining the court we are under some obligation to submit all kinds of questions to the court. But, as a matter of fact, the only questions which the court may decide are questions of law, exactly the same kind of questions that are submitted to the supreme court of the state of Minnesota. Now, what are they?

Under our domestic law, no question is ever submitted to an American court except under a contract or a right or claim under some law. That is exactly the situation as to the World Court. The World Court has no jurisdiction of political questions, nor of domestic questions which are entirely within the province of the United States.

This afternoon I was looking over one of the advisory opinions of that court. The court was careful to point out that it

was called upon to perform a judicial function, and, using the language of the court, "not to discuss or apply political principles or moral theories." Any other dispute must be settled by conciliatory means: by diplomatic correspondence between nations—consultation.

There has been great progress made since the war in advancing arbitration and conciliation, and it was made in the light of that terrible calamity. More than one hundred treaties have been entered into between the various nations of the world, to which the United States was not a party, for conciliation and arbitration; and I am not including in that the League of Nations nor the Locarno Pact. The principal duty of the League of Nations is conciliation and settlement of international disputes. The United States, since 1919, has entered into about sixty such treaties, not including the multilateral treaties, with the so-called Pan-American States, for conciliation and arbitration. Under this multilateral treaty for arbitration and under many other treaties that we have made, the United States agrees to submit all judicial questions, that is, questions arising under international law or under a treaty, to the adjustment of an arbitral tribunal or an international court. We have had to provide in these treaties for submission to arbitral tribunals, because we are not a member of the so-called World Court.

Now the United States is as much if not more interested in the World Court than any other country in the world. When we stop to think that our foreign commerce amounts to ten billions of dollars in a year; that the prosperity of the American people largely depends upon the maintenance of that commerce; that American citizens travel in and live in every country on the face of the globe; that there are many who are engaged in business in foreign countries; that questions arising out of our commerce, questions arising under our treaties, are continuing to arise with greater frequency than ever before in our history; that we have commercial treaties, arbitration treaties, and various other treaties with all nations of the world—isolation is no longer possible for any civilized country. A war which affects any part of the world touches the United States, affects our prosperity and our happiness.

Now, why should we have a World Court, instead of an arbitral tribunal? An arbitral tribunal is not necessarily made up of lawyers.

I heard a distinguished Senator speak not long ago in a meeting, and he said: "Why should we submit our disputes to foreign judges?" Well, that would exclude any arbitration. We have had about seventy-five arbitrations during the history of this country, or during the last one hundred years, at least, and the arbitral tribunals are not made up of nationalists of the United States—never more than one or two. If we are not to submit our legal questions to an international tribunal, an arbitral tribunal or a court, then we must decide them ourselves, and every other country will do the same.

The World Court was really an American conception. It has been recommended by every president since Grover Cleveland. It was endorsed by a resolution which the House of Representatives passed in 1925; it was approved by the United States Senate with only seventeen adverse votes, with the reservations which have now been agreed to under the Root protocol by the other nations.

I saw in a newspaper the other day that our presidents had not the authority to pledge the United States. Of course, no president has that authority without the approval of the Senate. But a World Court has been a policy of the United States for many years. David Dudley Field, in 1873, submitted a plan or outline of an international court. President McKinley stated in his first inaugural address, in 1897, that the leading features of American policy throughout our entire American history has been insistence upon the adjustment of these difficulties by judicial methods rather than by force of arms.

President McKinley and John Hay, his Secretary of State, instructed the American delegates to the first Hague peace conference to act in accord with a long-continued and wide-spread interest among the people of the United States in the establishment of an international court.

President Roosevelt, and Elihu Root, his Secretary of State, instructed the American delegation to the second Hague peace conference, to work for the development of the permanent Court of Arbitration which was set up at the Hague conference in 1899, "into a tribunal composed of judges who are judicial officers and nothing else, and who are paid adequate salaries, who have no other obligations, and are devoting their entire time to the trial and decision of international cases by judicial methods and under a sense of judicial responsibility."

And every president since that day has recommended the World Court, and it has been endorsed by the platforms of both great political parties.

So there seems to be public opinion back of this movement for a World Court.

A common argument against the World Court (I am glad to say not by lawyers generally) is that it is a League court, that it will entangle us in European alliances, that we should not submit our disputes to foreign judges, and that it is the back door to the entry into the League.

Now, these are political shibboleths or catch-words, easy to make, difficult to refute. But if we will just come down out of the misty clouds of oratory and consider the plain facts, we will see that there is no foundation whatever for any such statement. The League did not originate the idea, formulate the statute, or adopt it. The idea has been prevalent in this country and other countries for many years. The statute of the World Court was adopted by each separate country—*not* through the League—and in the same manner that a treaty between nations is adopted—by their parliaments, senates (the way we do), by the chief executive. It is true that the League Covenant provided that “the council shall promptly submit to the members of the League for adoption plans for the establishment of a permanent court of international justice,” and, with the exception of the election of judges, which I shall discuss presently, that is the beginning and the end of the activities of the League in the formation of the World Court.

The council did appoint a committee of distinguished jurists, and that committee drafted the statutes of the World Court. The only reason that the World Court was not established at The Hague was that they could not agree upon the manner of election of judges. So they established what is known as the Hague Tribunal, which is nothing more than a panel of jurists from which we may draw arbitrators if we desire. Mr. Elihu Root was a member of that committee, and it was owing to him that an agreement was finally reached as to the manner of electing judges. I do not remember the other members, but they were distinguished lawyers selected by the council.

Now, would you say that a court in this country which may give advisory opinions was a political court because it was

established by the legislatures? Many of our states have provided for advisory opinions.

What other duty has the League in the World Court? No other than the election of judges. As I said before, we have never been able to agree upon a system for the election of judges. The great powers were not willing that each nation should have an equal vote in the selection of judges. The small nations were not willing to leave it to the large ones. The consequence was there was a deadlock at both Hague conferences, and there always has been a deadlock until after the League was established. It was then provided that the judges should be elected by a separate vote by the council and the assembly.

Each judge elected was required to receive a majority of the votes of both the council and assembly. There was no objection, so far as I know, in the Senate; no serious objection to this manner of electing judges. The United States Senate, when it ratified the statute of the World Court, provided, in the second reservation, that the United States shall be permitted to participate through representatives designated for that purpose, upon an equality with the other states, members respectively of the council and the assembly of the League of Nations, in any and all proceedings for the election of judges to the permanent court of international justice.

If there had been very serious objection to that means of election, I think it would have been urged very strongly in the Senate debate upon the World Court.

Not only are the judges elected in this manner—and I have never heard any complaint as to the manner of election—but they must be nominated in the first place by the representatives of each nation in the Hague Tribunal.

The United States and every other nation who is a party to the Hague conventions has four representatives in the Hague Tribunal; Mr. Root, Mr. Hughes, Mr. Newton D. Baker and Mr. John Bassett Moore were our representatives until about a month ago when Mr. Hughes resigned after being appointed Chief Justice of the United States Supreme Court, and Mr. Roland Boyden was appointed. First, the representative must be nominated by each country through its representative in the Hague tribunal. Next, he must receive the majority vote of both council and assembly. And most of the nations in the world are parties to the League of Nations.

I say this was the first time in the history of the agitation for an international tribunal when a system of electing judges was devised, largely by Mr. Root, which met the approval of the large nations and the small nations.

Is it possible that the great, intelligent public opinion of the United States is not willing to endorse the World Court simply because it had its origin (not its first inception) in a committee appointed by the League to draft the statute of the World court?

The argument is frequently made that we should avoid entangling alliances. I am not sure that everyone who makes that argument knows what an entangling alliance is. I am not in favor of the United States joining in alliances, either entangling or otherwise. An alliance is an agreement between two or more countries, whereby they agree to support each other in any conflict with any country. That means, support them with arms.

This country never had but one, and that was the treaty with France, I believe made in 1793. We have never made such a treaty since, unless the Panama treaty may be called such; and we had a particular interest, of course, in the maintenance of the stability of Panama.

Now, what possible entangling alliance can there be, by the United States belonging to a court of which we may ask the decision of a legal question pending between our country and some foreign country? Not a political question; not a domestic question; nothing but a legal question. And if we are not willing to submit legal questions to a world tribunal, then we had better withdraw any claim to the advancement of arbitration and conciliation for the settlement of international disputes.

When it comes to the question of entangling alliances, the United States has had many times much more intimate connection with the activities of the League of Nations than it possibly could have by joining the World Court. The United States has sent regular delegates to twenty-two conferences called by the League. These conferences have considered a variety of subjects such as disarmament, control of traffic in opium, control of traffic in arms; a special commission on manufacture of arms; international economic conferences; conferences on the abolition of import and export prohibitions; conferences on counterfeiting; on double taxation; and on many more subjects in which the American people are intensely interested.

These twenty-two conferences to which we have sent regular delegates have performed a great service for this country in protecting American interests. As most of them were during my term as Secretary of State, I know that they have been a very great benefit to American trade and commerce and international affairs.

Not only that, but we have sent delegates—unofficial observers—to twenty or more conferences in which we thought the United States had no particular interest other than to be kept informed as to the proceedings of the conferences called by the League of Nations. Every one of the conferences called on disarmament—the preliminary conferences—was attended by delegates from the United States; and the Congress of the United States has made appropriations, without any serious objection, to pay a share of the expenses of many of these conferences. If that is not more entangling than the mere joining of the World Court, then I do not understand what foreign entanglement means.

This is quite necessary. We must think about this seriously. Nearly all the nations of the world are members of the League.

The activities of the League are very largely in the adjustment of these very problems, these economic problems, the restriction of the sale of opium, the sale of arms, disarmament, and various other questions; and if the United States is not going to attend, its people and its interests are not going to be protected.

So, when I hear this argument, that we should keep out of all "foreign entanglements," I wonder if the men who make that argument really understand what they are talking about.

One of the principal objections to the International Court of Justice, or the World Court, as it is commonly known, is that it is authorized to give advisory opinions. Senator Pepper, who is one of the opponents of our entry into the World Court, although he voted for the ratification of the statute with the reservations attached by the Senate, said in a speech in Chicago recently: "I say that the advisory function of the court is inconsistent with and potentially destructive of the court's judicial function." Well, let us see about that. The court could only give an advisory opinion on a legal question, exactly the same as it would on a contested case submitted by the nations.

Is there any reason, if its advice is taken as to a legal question, why it should not give an advisory opinion? The distinguished senator seemed to think that advisory opinions are not known in the United States. Prior to 1923 there were not many states which authorized their courts to give advisory opinions. But what is an advisory opinion? The League of Nations may ask the World Court for a legal opinion on some proposition arising under a treaty or principle of international law. The distinguished senator forgets that we have had advisory opinions in Massachusetts for many years; and will anyone say that it has been destructive of the judicial standing of that great court? Since 1923, fourteen states of the United States have adopted advisory opinions—not by that name. “Declaratory judgments.” You lawyers understand what that means. A Uniform Declaratory Judgment statute was approved by the American Bar Association and, I believe, submitted to all the states. Fourteen states have adopted it. Is it possible that, if advisory opinions were destructive of the judiciary or destructive of the judicial functions, that the fourteen states would have adopted them?

Is there any less reason why the World Court should give an advisory opinion than why our courts should give an advisory opinion? You know what a declaratory judgment is. It is an opinion of a court upon a legal question without what is known as a case in which remedy may be applied by the court. In Massachusetts the legislature may ask the court as to the constitutionality of a statute.

The only opinions ever delivered by the World Court, or which could be delivered, where there is no well settled principle of international law, are opinions arising out of cases under treaties.

To illustrate: When an advisory opinion was asked as to the status and rights of Germans in Poland after the war, under a treaty made on June 28, 1919, the court construed the treaty and settled the principle as to the rights of the German citizens in Poland after that treaty was made; and that was accepted by both countries.

I have read with great care every advisory opinion delivered by the World Court. And I say, without fear of contradiction, that many of those opinions have warded off conflicts, and pro-

cured the settlement of difficult problems arising between the different countries involved—more particularly those countries created after the war in eastern central Europe.

The argument has been made that, if the United States stays out of the World Court, it is perfectly safe, and that it cannot be affected by any opinion delivered. Well, it cannot be affected by any opinion delivered by the court without its consent, in any event. If any one thing is absolutely assured, it is that no country can be compelled to submit any question to the World Court unless it has signed the obligatory provision—which the United States has not signed and cannot sign or adopt without the approval of the United States Senate.

Now, what does the protocol provide? It is said by some that foreign countries were not satisfied with the reservations adopted by the Senate, and that they were rewritten to satisfy them. As a matter of fact, every one of the reservations except the fifth reservation was approved by all the other countries. There are five reservations. The first is that such adherence shall not be taken to involve any legal relation on the part of the United States to the League of Nations, or the assumption of any obligation of the United States under the Treaty of Versailles. That was accepted. There could not be any legal obligation anyway, but there was no objection.

The second, I read a few moments ago, about the election of judges. That was approved.

The third one: The United States shall pay its fair share of the expenses of the court. That was naturally ratified by the other countries.

The fourth: The United States may at any time withdraw its adherence to the protocol of the World Court. That is accepted by the other countries.

Fifth: That the court shall not render any advisory opinion except publicly after notice to all states adhering to the court, and to all the interested states after public hearing, or opportunity for such hearing. That was accepted.

The second half of the fifth reservation was not approved. It provides:

“Nor shall it [the court], without the consent of the United States, entertain any request for advisory opinion touching any dispute or question in which the United States has or claims an interest.”

The Root protocol provided for a means of determining whether the United States had or claimed an interest in any controversy where an opinion was asked for by the League of Nations.

The protocol provided that all the nations accept these reservations, including the latter. The only part of the protocol which we need to consider now is the means of determining whether the United States has or claims an interest in the controversy. Of course, if the United States were a party, and had a direct interest, no one claims that the court could give an opinion without its consent. That is provided for by the statute.

Furthermore: Can there be any objection to the means provided for by the Root protocol for determining that question because it could not without the consent of the United States be determined against it?

The protocol in substance provides that proponents of a question to be submitted to the World Court for advisory opinion shall give notice to the United States, and shall enter into correspondence or negotiations to find out whether the United States has or claims an interest, and whether the United States insists on that position. If no opportunity has been given the United States for consultation upon that subject, and an opportunity to express its opinion, then the court must stay all proceedings until the United States has an opportunity to discuss the question, and to decide for itself whether it has any such interest as it would insist the court should not pass upon without its consent. If the United States still insists that the question submitted affects the United States, or that it has an interest in it, and the proponents insist on the opinion, the United States may withdraw without prejudice from the court.

How are we any worse off by going through that proceeding than we would be to stay out of the court entirely? This great country ought not to object to negotiating to make known to the rest of the world the interest it claims in any question submitted for an advisory opinion; and we are better off by joining the World Court, as to advisory opinions, than we would be if we stayed out. If we entirely stay out of the World Court, it can give an advisory opinion on any question at any time without the consent of the United States. If we are parties to the World Court, it cannot give an opinion without the consent

of the United States, and the statute of the World Court has been amended so as to cover that point. The statute now provides, by an amendment which was made last year:

"In the exercise of its advisory function, the court shall further be guided by the provisions of the statute which apply in contentious cases to the extent to which it recognizes them to be applicable."

As a matter of fact, that statute alone, without any reservations, would entitle the United States to raise an objection to the delivery of any advisory opinion upon any question in which it claims an interest. So I cannot see any danger. While, if we stay out of the court entirely, it may deliver advisory opinions on any subject without consulting the United States.

There was a committee appointed to draft that particular statute, and in the report of the committee is stated the reason for its adoption; and that reason was that the court should follow the same proceeding as to advisory opinions that it does in contentious cases. They must give notice to all parties interested or claiming an interest. All parties have a right to be heard in the court on a question of advisory opinion, and the opinion must be delivered in open court, the same as any opinion in a contentious case. This seems to me to be perfect protection to any country.

Why is it that we prefer a court to an arbitral tribunal? Anyone who has had the experience I had for four years in trying to get countries to arbitrate judicial questions—and those are the only questions which can be arbitrated—would know that there is no certainty that the arbitrators will be lawyers. There is no certainty that they will apply legal principles.

We would select one arbitrator; the other country selects another; and the third—or, if there are two selected by each country, the fifth—must be selected by agreement, or, as is usual, appointed by some neutral country.

In my opinion there is more danger of political intrigue in such a proceeding than there is in submitting the case to a court made up of distinguished lawyers appreciating the judicial functions and the traditions of a court. The American people have more confidence in such a court, and the people of all nations have more confidence in such a court than they would have in an arbitral tribunal which may be made up of men who are not lawyers,

and who are not bound by the application of the principles of law.

In the decision of any question by the World Court the Court is obliged by statute to apply legal principles. The statute provides as follows:

“The Court shall apply:

1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
2. International custom, as evidence of a general practice accepted as law;
3. The general principles of law recognized by civilized nations.
4. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.”

These provisions mean that in the decision of questions the Court shall apply treaties in force between the countries bearing upon the question; and well established principles of international law. As principles of international law are established by treaties and by general custom accepted as law, the effect of these provisions is that the Court must decide all questions on principles of law. The last clause of this provision provides that if the parties agree thereto the Court may decide a case *ex aequo et bono*; that is nothing more than applying principles of justice and equity.

Is it possible that the United States, which has been a leader in the establishment of arbitration and conciliation, is not willing to lend its influence to the first great international tribunal established in the world? That the United States, which has taken an advanced position in establishing world peace, is not willing to lend its influence to a great court established to decide questions of law between nations?

If we are not willing to become a party to this court, then we should withdraw all pretense to the desire for arbitration of international disputes.

We are faced with this proposition: Either the United States will join the World Court now established, and which has been functioning for nearly ten years, or we will not be a party to any world court at all. It cannot be expected that over fifty nations of the world will abolish this court and make another to get the approval of the United States. I am satisfied that the nations are

perfectly willing that we should be protected in every manner so that we shall not be compelled to submit a case to the court without the approval of this country. And it seems to me that lawyers, who understand these propositions, should advocate the adoption of the World Court as a great step forward in the settlement of international questions. Because, unless nations become accustomed to adjusting their difficulties, inevitably war will ensue.

Are we wedded to world peace? Are we willing to do everything reasonable to advance world peace? I believe that the American people are, and I am satisfied that the public opinion of this country will strongly support the adoption of the World Court statute.